

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs July 27, 2004

**DEMETRIUS K. HOLMES v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Knox County**  
**No. 76368     Richard Baumgartner, Judge**

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**No. E2003-02306-CCA-R3-PC - Filed October 7, 2004**

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The Defendant, Demetrius K. Holmes, was convicted by a jury of first degree felony murder and especially aggravated robbery. The Defendant's convictions were affirmed on direct appeal. See State v. Demetrius K. Holmes, No. E2001-00660-CCA-R3CD, 2002 WL 1611565 (Tenn. Crim. App., Knoxville, July 23, 2002). The Defendant subsequently petitioned for post-conviction relief, alleging that he received ineffective assistance of counsel at trial, in conjunction with his motion for new trial, and on direct appeal. After an evidentiary hearing, the trial court denied relief. Finding constitutional error in the jury instructions provided at the Defendant's trial and ineffective assistance of appellate counsel in failing to raise the error on direct appeal, we vacate the Defendant's convictions and remand this matter for a new trial.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed;  
Conviction Vacated; Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

Liddell Kirk, Knoxville, Tennessee, for the appellant.

Paul G. Summers, Attorney General and Reporter; Michelle Chapman McIntire, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip Morton, Assistant Attorney General, for the appellee, State of Tennessee.

**OPINION**

A brief review of the facts adduced at trial will be helpful. The victim, Clarence Arnold, was a frequent customer of Aretha Cross, a prostitute and crack cocaine addict. Ms. Cross had also known the Defendant for several years and had often bought crack cocaine from him. On the morning of May 19, 1999, Ms. Cross witnessed the victim buy some crack from the Defendant. Later, the victim purchased drugs from another individual and, during the transaction, the Defendant

arrived unexpectedly and became angry. Ms. Cross testified that the Defendant told them, “Don’t think I’m playing with ya’ll; I’m going to get a gun.”

That afternoon, Ms. Cross and the victim were in an apartment that Ms. Cross frequented. She opened the door and found the Defendant standing in the doorway. The Defendant asked them if they “need[ed] any crack,” to which she responded in the negative. The Defendant then pointed a gun at the victim and demanded money. Ms. Cross panicked and told the victim to give the Defendant the money. As the victim handed money to the Defendant, Ms. Cross ran out of the apartment and hid in a nearby corner. She then heard a single gunshot. As the Defendant left the apartment, he pointed the gun at Ms. Cross and said, “You the only one know . . . what I done, and I will kill you.”

Ms. Cross ran into the apartment to find the victim bleeding from the chest. She called 911 and told the dispatcher that she did not know who shot the victim. She also told police officers initially that she did not know who shot the victim. She subsequently identified the Defendant to the police as the shooter, and identified the Defendant from a photographic line-up. She maintained at trial that the Defendant shot the victim.

The victim died from a single gunshot wound to the chest.

Police officer Joe Cox testified that he arrived on the scene of the shooting at “almost 5 o’clock.” By that time, medical personnel were already working on the victim. There was no physical evidence connecting the Defendant to the crime.

The Defendant did not testify at trial. His theory of defense was that he was not the shooter. Dalandra Porter, a friend of the Defendant’s, testified that the Defendant had arrived at her residence between 3:00 and 3:30 on the afternoon of the murder and “stayed till about 5:30” that afternoon. Dalandra also testified that it would take fifteen to twenty minutes to drive from her residence to the crime scene. Sandy Porter, Ms. Porter’s mother, testified that she lived with her daughter. She explained that the Defendant visited them twice on the afternoon of May 19, arriving the first time in the “early afternoon,” and arriving the second time “around 5:00 or a little after.” She stated that the Defendant stayed “for a while” both times. She also stated that it would take “about ten minutes” to drive from their apartment to the crime scene. Detective Sam Brown testified in rebuttal that it took “less than five minutes” to drive from the crime scene to the street where the Porters lived.

In spite of the defense witnesses’ testimony, defense counsel did not request, and the trial court did not give, a jury instruction on alibi. After the trial, the Defendant obtained new counsel for his motion for new trial; the failure of the trial court to give an alibi instruction was not, however, raised. After the motion for new trial was denied, the Defendant obtained yet another lawyer, who handled his direct appeal. Appellate counsel did not raise as an issue the missing alibi instruction.

In his claim for post-conviction relief, the Defendant alleges that his trial counsel, new trial counsel and direct appeal counsel were all ineffective in failing to pursue the issue of the trial court's failure to provide the jury with an instruction on the defense of alibi.

### **STANDARD OF REVIEW**

Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer, and actual prejudice to the defense caused by the deficient performance. See id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. See Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." See Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See id. "However, a trial court's conclusions of law--such as whether counsel's performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id.

## ANALYSIS

A trial court has the affirmative duty to instruct the jury on every issue raised by the proof, including the defendant's theory of defense, and specifically including alibi. See Poe v. State, 370 S.W.2d 488, 489 (Tenn. 1963). Our pattern jury instruction on alibi provides as follows:

The defendant has presented evidence of an alibi in this case.

An alibi is defined as evidence which, if believed, would establish that the defendant was not present at the scene of the alleged crime when it allegedly occurred. If the defendant was not present when the crime was committed, he cannot be guilty.

The burden is on the state to prove beyond a reasonable doubt that the defendant was at the scene of the crime when it was committed. If you find from your consideration of all the evidence that the state has failed to prove beyond a reasonable doubt that the defendant was at the scene of the crime when it was committed, you must find the defendant not guilty.

T.P.I.--Crim. 42.13.

The trial court must instruct the jury on the defense of alibi when it is "fairly raised" by the proof, see Manning v. State, 500 S.W.2d 913, 915 (Tenn. 1973), irrespective of whether or not the defendant requests the instruction. See Poe, 370 S.W.2d at 491. Proof of an alibi sufficient to require an instruction exists where (1) the defendant's claim that he was not at the scene of the crime is corroborated by other credible witnesses; (2) the victim has been unable to identify the defendant; or (3) the proof against the defendant is wholly circumstantial. See Manning, 500 S.W.2d at 916. In this case, all three of these circumstances exist: Dalandra Porter testified that the Defendant was in her presence at the time the victim was shot; the victim died prior to identifying his shooter; and the proof against the Defendant was wholly circumstantial. Accordingly, we agree with the Defendant that the jury should have received an instruction on the defense of alibi.

Our supreme court has made clear that, where fairly raised by the proof, the trial court's duty to instruct the jury on alibi is "fundamental" to an accused's defense and "essential to a fair trial." Poe, 370 S.W.2d at 489. A trial court's error in this regard is, therefore, reversible unless the reviewing court is convinced beyond a reasonable doubt that the error had no effect on the outcome of the trial. See Manning, 500 S.W.2d at 916-17; see also Moffitt v. State, 29 S.W.3d 51, 55 (Tenn. Crim. App. 1999).

The post-conviction court determined that trial counsel had not been ineffective in failing to pursue an alibi instruction because, according to her testimony at the post-conviction hearing, the Defendant had told her at some point that he was in the building where the victim was killed at the time of the shot. Accordingly, the post-conviction court determined that it would have been "unethical" for trial counsel to have requested the alibi instruction, even though she put alibi

witnesses on the stand. This finding does not address, however, the trial court's independent duty to have given the alibi instruction, and post-trial counsel's duty to have questioned the fact that it was missing. The post-conviction court did not make any findings with respect to whether subsequent counsel had been ineffective in failing to pursue this issue.

We are cognizant, of course, that this claim comes before us in the context of an ineffective assistance of counsel claim. Had, however, this issue been raised on direct appeal, we are confident that this Court would have reversed the Defendant's convictions and remanded the matter for a new trial. We arrive at that conclusion because the sole proof of the Defendant's involvement in this case came from a witness with serious credibility issues. The Defendant contested this proof with a witness of his own who testified that the Defendant was with her at the time the crime was committed. The jury should have been instructed on how to evaluate these two competing claims. Based on our review of the transcript of the trial, we simply cannot conclude beyond a reasonable doubt that the jury's verdict would have been the same had it been given an appropriate instruction on how to evaluate proof of an alibi. The Defendant has therefore established that he was prejudiced by his appellate counsel's failure to raise this matter on direct appeal. We must therefore inquire whether appellate counsel's decision to not raise this issue fell below the level of competent representation demanded of criminal defense attorneys.

At the hearing on the Defendant's petition for post-conviction relief, the lawyer who handled the Defendant's direct appeal, Mr. Kenneth Francis Irvine, Jr., was questioned as to why he did not raise this issue in the direct appeal. Mr. Irvine responded,

There certainly were two alibi witnesses that testified, and quite frankly, I can't tell you -- I don't believe I noticed the absence of an alibi instruction. So [the Defendant and I] didn't know to discuss it. The first -- I think the first time that I even had looked was today when [the Defendant's post-conviction counsel] had said that he couldn't find it in the instructions, and I went just to look to see.

This testimony makes clear that appellate counsel did not make a strategic decision to not raise the issue of the missing alibi instruction: he simply failed to notice this particular problem with the Defendant's trial.

Given that appellate counsel's failure to raise the issue of the missing alibi instruction was not the result of a conscious, strategic decision, and given that the Defendant would most likely have been awarded a new trial had the issue been raised on direct appeal, we are forced to conclude that appellate counsel's failure in this regard constituted ineffective assistance of counsel. As such, the Defendant is entitled to relief.

The Defendant also claims that his direct appeal lawyer was ineffective in failing to raise as an issue whether the trial court committed reversible error in allowing Ms. Cross to testify about the

Defendant's involvement in selling cocaine. The Defendant contends that, in allowing this testimony, the trial court violated Tennessee Rules of Evidence 403<sup>1</sup> and 404(b).<sup>2</sup>

Prior to trial, defense counsel objected to the State being allowed to introduce evidence about the Defendant's drug dealing. While defense counsel acknowledged that Ms. Cross might be allowed to testify that one of the bases for her relationship with the Defendant was that she had purchased drugs from him, defense counsel strenuously objected to proof that went beyond this; for instance, testimony about where he "posted" as a drug dealer. The trial court ruled as follows:

Ms. Cross can testify as to her basis of knowledge of [the Defendant], including the fact that she is a drug addict, and she has purchased drugs from [the Defendant] and the location which he sells them, because it is relevant to the case. No other witness can testify about their knowledge of [the Defendant's] drug dealings unless you get permission from me prior to bringing it up in the presence of the jury. You have to seek and get permission from the Court in a jury-out hearing to do that before you are allowed to do it.

Ms. Cross subsequently testified that she had bought crack cocaine from the Defendant, that she brought people to him for that purpose "several times," and that she had seen the victim "trying to cop some crack" from the Defendant on the morning of May 19.

The lawyer who assisted the Defendant on his motion for new trial raised this issue. Counsel for the Defendant's direct appeal chose not to pursue it further. He testified at the post-conviction hearing that he thought the trial court "had made the correct ruling." Based on appellate counsel's testimony, the post-conviction court found no ineffective assistance of counsel in this regard.

We agree with the post-conviction court. Had appellate counsel raised this issue on direct appeal, we believe that this Court would have found the admission of Ms. Cross's testimony either proper or, at most, harmless error. Accordingly, no relief would have been granted to the Defendant on this ground. The Defendant has therefore suffered no prejudice by his appellate counsel's decision to not pursue this issue. The Defendant having failed to prove that his appellate lawyer was ineffective in this regard, this issue is without merit.

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<sup>1</sup>"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

<sup>2</sup>"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are: (1) The court upon request must hold a hearing outside the jury's presence; (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice."

Finally, the Defendant also alleges that his trial counsel was ineffective in failing to call Mr. Donnell Booker as a defense witness. The Defendant initially raised this issue in his motion for new trial. Accordingly, at the hearing on the motion, Mr. Booker testified. The gist of Mr. Booker's testimony was that he was present at the scene of the shooting and that, while he did not see the actual shooting, he heard the gunshot and then saw a man leave the building with a gun in his hand. Mr. Booker recognized this man and testified that the man was not the Defendant, whom Mr. Booker also knew. The Defendant's trial counsel then testified that she had Mr. Booker under subpoena at the time of the trial and was prepared to call him to testify when the Defendant demanded that she not put him on the stand. She acquiesced to the Defendant's decision after strongly advising him that the witness should be called. The Defendant testified at the motion for new trial hearing that his lawyer did not call Mr. Booker because she was trying to sabotage him. The trial court credited trial counsel's testimony and found that she had not been ineffective in failing to call a witness that her client demanded she not call. The court came to the same conclusion after the post-conviction hearing.

We find no error in the lower court's determination of this issue. While we agree with the Defendant that the decision of which witnesses to call is normally a strategic one best left to defense counsel's informed judgment, we will not fault a lawyer who declines to call a witness after his or her client demands at trial that the witness not be called. Such a lawyer is faced with a no-win dilemma: if she calls the witness against the client's directive, and the witness then proves damaging to the client's case, the lawyer will be subject to a claim of ineffective assistance. Similarly, as is the case here, if she acquiesces to the client's demand, the client can then later claim that the witness was crucial to his defense and that it was the lawyer's fault that the witness was not called. Defendants who insist on being their own co-counsel often must suffer their decisions. The Defendant is not entitled to relief on this ground.

In summary, we hold that the Defendant received ineffective assistance of counsel on direct appeal and thus is entitled to a new trial. Accordingly, we reverse the judgment of the trial court. We vacate the Defendant's convictions and remand this matter for a new trial.

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DAVID H. WELLES, JUDGE